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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1941

No. 653

HOTEL MARKHAM, INC., ET AL,
Petitioners,

versus

EDWARD BALL, ET AL,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

AND BRIEF IN SUPPORT THEREOF

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PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petition of the Hotel Markham, Inc., A. D. Simpson, George B. Neville, W. W. Willis, Herbert Holmes, and F. N. Billingsly, individually as the members of the Bondholders' Protective Committee under an agreement executed July 1, 1930, and as the Board of Directors of the Hotel Markham, Inc., shows as follows:

Respondents herein are Edward Ball, Julius F. Stone and A. B. Weddington.

By certiorari petitioners seek review of a holding of the Fifth Circuit Court of Appeals, that a trust agreement entered into by trustees, and the formation of an operating corporation for the purpose of carrying out the duties un-

dertaken thereby, rendered a Bondholders' Protective Agreement under which the trustees acted, *functus officio,* so that the trustees were no longer bound or protected thereby, or obligated to protect the interest of minority interests; but were bound to surrender the stock and securities of the operating corporation to the beneficiaries, notwithstanding the fact that such action would place the majority holder in position to force a foreclosure or to take control without regard to the interest of the minority holders, the protective agreement and the declaration of trust both providing for distribution only when a sale should be made, or a reorganization perfected; the beneficial interest under the trust being evidenced by negotiable certificates of which Respondent herein had acquired majority control, either by purchase or option to purchase in the event he prevails in this litigation.

SHORT STATEMENT

Petitioners were made defendants in a complaint filed in a civil action by the respondent, Edward Ball. Julius F. Stone and A. B. Weddington, respondents herein, and three others not respondents, intervened in said action as co-plaintiffs. Mrs. A. M. Loeb and about twenty-three others, as certificate holders, intervened as co-defendants, seeking to have the trust preserved and the Committee control continued. (R. p. 173). On a hearing of all the issues presented, the District Court dismissed the complaint of Edward Ball and all the intervening plaintiffs. Thereupon, Edward Ball, Julius F. Stone, and A. B. Weddington prosecuted an appeal to the Circuit Court of Appeals for the Fifth Circuit, where the judgment of the District Court was reversed and the action was remanded with directions. On the action of the Circuit Court of Appeals, these petitioners seek review

by this Honorable Court by petition for certiorari, and a reversal of the judgment entered against them and the reinstatement of the judgment of the District Court.

The individual petitioners herein are the members of a Bondholders' Protective Committee, formed to take over, own and control bonds in the amount of $559,000, or the properties subjected to a lien to secure the same, of the Gulfport Hotel Company, Inc., the former owners of the Hotel Markham in Gulfport, Mississippi. Pursuant to the unlimited powers vested in these respondents by the Protective Agreement, they acquired the property by a foreclosure sale and caused the respondent, Hotel Markham, Inc., (referred to as the Trustee Corporation) to be incorporated and to issue its cumulative interest bearing debentures in the amount of the bonds and coupons deposited under the agreement, all maturing on November 1, 1940, and caused no par value stock, set up on the books of the corporation at $5.00 per share, to be issued at the rate of one share for each $100.00 of par value of bonds deposited with respondents, and conveyed the physical properties to The Trustee Corporation for operation and management. Both the debentures and the shares were placed with depositories by respondents, subject to their control under the agreement. The debentures were secured by a mortgage which provided that a completed default should occur upon default in payment of the principal of any debenture when due, whether at maturity or by declaration or otherwise, as provided; and that foreclosure might be had upon the request of the holders of 20% of the debentures unless a majority should object. The mortgage and debentures provided for redemption of debentures or refunding of the debt on November 1st or May 1st of any year prior to maturity (1940). (R. 99, 106).

Preceding the organization of the trustee corporation, a trust was declared by the individual respondents that they, as a committee, would hold the property in trust for the depositing bondholders, or their assigns, pursuant to and under the unlimited powers in the Committee Agreement; and the depository certificates were surrendered to the depositories by the original bondholders, in exchange for certificates of participation in the trust. By the terms of the above-mentioned instruments, and those related and collateral thereto, all of the rights, powers and ownership in, of, and to the physical properties were vested in the individual respondents, as trustees under the original bondholders' Protective Agreement by the ownership of the debentures and stock of the trustee corporation, in trust for the original bondholders, or their assigns, and for their equal and proportionate benefit.

Under and through the operation of the hotel properties through the Trustee Corporation, by the individual petitioners, from November 1, 1930, to November 1, 1939, the cost of purchasing additional facilities not covered by the original mortgage, necessary improvements and equipment, to the total sum of $215,004.07, were paid from operating profits. In addition $65,885 was paid against accrued interest on the debentures, most of those payments coming during the latter years of operation.

By reason of the continued depression on the Mississippi Gulf Coast, where the trust property was situated, the trustees, after repeated efforts, had failed to sell the trust property—a large hotel—at an adequate or acceptable price.

Having sufficient capital upon which to operate and to preserve the hotel properties but not having sufficient funds or capital assets to pay the principal on the debentures of

the Trustee Corporation, the individual petitioners, as the officers and stockholders, took the necessary action to enable the corporation to exercise its option under the terms of the mortgage and debentures, to refund the debt by issuing new debentures covering the principal and interest on those outstanding and in the hands of the committee. This action was necessary to prevent a default in the mortgage, pending the further efforts of the trustees to sell the trust property for distribution of the proceeds.

Respondents brought an action to enjoin issuance of the refunding debentures and require the delivery to them of the original debentures and shares of stock held in trust for them, as evidenced by a reissue of participation certificates to respondent Ball for the face value of $243,370 of original debentures and the corresponding stock in the Trustee Corporation, and by original certificates issued to the other respondents, all of which would constitute a majority of the stock and debentures. It also appeared that respondent Ball held an option to purchase other certificates which would give him majority control of both stock and debentures, in the event he should prevail in his action.

The individual petitioners and the trustee corporation defended the action under the terms of the original Bondholders' Protective Agreement, declaration of trust, mortgage, participation certificates, and their rights, powers and privileges previously conferred upon them. The District Court heard the case and rendered its written opinion that the individual respondents were vested with an uncontrolled discretion to take the proposed action to protect the trustee corporation and the trust properties, and that there had been no abuse of discretion. No formal findings of fact and con-

clusions of law were filed to affect strict conformity to Rule 52 of the Rules of Civil Procedure, but the court rendered a comprehensive opinion covering all matters in controversy.

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the court, in its majority opinion, accepted the opinion of the District Court, but reversed its findings and found that the purposes of the Protective Agreement and Declaration of Trust had been fulfilled by the organization of the trustee corporation, and that the individual petitioners had abused their discretion in attempting to refund its debentures. After reversing the judgment of the District Court, the court, in its majority opinion, directed a further consideration of any other plan that might be presented for saving the Trustee Corporation, and its obligations and properties to the committee or to the certificate holders without consideration of the fact that the time for the issuance of refunding debentures had expired, and the mortgage on the trust properties was subject to immediate foreclosure; and that if the right to possession of the stock and debentures had passed to the certificate holders, petitioners and minority certificate holders would have no further rights and powers under the protective agreement or the trust agreement, but that all power would have passed to respondents herein, subject only to such control as the court might have in the exercise of its powers as a court of equity, and under appropriate process, thereby placing the minority certificate holders in exactly the position they sought to escape by joining in the protective agreement and assenting to the trust.

The majority opinion of the Circuit Court establishes the law of the case for further proceedings on remand and requires the District Court either to terminate the trust

and distribute the assets, or to take over the trust for judicial administration and control, both results being contrary to the jurisprudence of the State of Mississippi, and such applicable statutes as establish rules of property. The apparent purpose of the court, is to effect or require a reorganization of the trustee cororation as if a petition for an arrangement had been filed and jurisdiction accepted.

The majority opinion manifests a purpose not to terminate the trust and destroy the power and authority of the trustee, but to have petitioners continue in control of the property as judicial trustees. This proposal found its first expression in the opinion of the court, and without petitioners having an opportunity to controvert the question of the power of the court arbitrarily to superimpose its supervision upon the powers of the trustees under trust instruments which granted unlimited powers to the petitioners to act without supervision or control, other than their own judgment. It leaves the way open for the court to require the surrender of the trust properties to the beneficiaries, while the trustees are expected to continue in the exercise of their trust powers, without giving petitioners a day in court on which they might be permitted to show that powers in trust are not recognized in such cases under the laws of Mississippi, and that the trust which both the District Court and the Circuit Court of Appeals intended to preserve, would be destroyed by merger.

JURISDICTIONAL STATEMENT

Jurisdiction to grant the Writ of Certiorari on this petition is conferred by Judicial Code Section 240, as amended February 13, 1925, 43 Stat. 938 (28 USC 347). See also the Acts of January 31, 1928, 45 Stat. 54, and April 26, 1928, 45 Stat. 466 (28 USC 861 a. and b.).

Respondent, Edward Ball, is a resident of the State of Florida, and filed his complaint in the Southern District of Mississippi, the District in which all of the petitioners except F. N. Billingsly reside, the latter having his residence in the Eastern District of Louisiana. (R. p. 15 et seq.). The amount in controversy is in excess of $3000. (R. p. 16, par. 3; R. p. 134, par. 3; Dissenting Opinion of Judge McCord, R. p. 653).

Judgment was entered in the District Court on May 1, 1940, (R. p. 621). Motion for a New Trial was filed May 10, 1940, (R. p. 621), and overruled May 22, 1940, (R. p. 625). Notices of appeal were filed August 13 and 22, 1940, (R. p. 627), and bond for appeal was filed August 13, 1940, (R. p. 628). Within forty days after the filing of the Notice of Appeal, or after August 13, 1940, the District Court, on application duly made, extended the time for filing the transcript to ninety days from said date, (R. p. 637), and the record was duly certified to the Circuit Court of Appeals by the Clerk of the District Court on November 4, 1940, (R. p. 641), and was filed in the Circuit Court of Appeals.

The Appeal was heard by the Circuit Court of Appeals on April 29, 1941, (R. p. 642) and the court rendered its opinion on June 9, 1941, (R. p. 643 et seq.) and entered its judgment of even date, reversing the cause and remanding it to the District Court for further and not inconsistent proceedings (R. p. 659). On June 17, 1941, a motion was made by petitioners for further time to file a petition for a rehearing (R. p. 660), which was granted with an extension for thirty days on June 17, 1941 (R. p. 662). Petition for Rehearing was filed by petitioners on July 19, 1941, (R. p. 663), and was overruled on August 7, 1941 (R. p. 666). On motion therefor (R. p. 667), a stay of mandate was granted

on August 29, 1941 (R. p. 668), said stay allowing petitioners thirty days from the date thereof to file this petition to this Honorable Court.

QUESTIONS PRESENTED

1. Whether or not the incorporation of Trustee Corporation by petitioners was a reorganization, within the meaning of the declaration of trust, which required the stock and debentures of the corporation to be distributed as soon as the obligations of the Committee were paid, it appearing of record:

   a. That the Trustee Corporation was incorporated by the petitioners as a holding and operating corporation and as an instrumentality of the Committee in administering the trust in pursuance of the express power so to do granted by Paragraph 7 of the Bondholders' Protective Agreement. (R. 63).

   b. That the reorganization referred to in the declaration of trust and in the Bondholders' Protective Agreement had reference to a reorganization of the Gulfport Hotel Corporation and not to the incorporation of a new company as an instrumentality of the Committee.

   c. That the incorporation of the Trustee Corporation by the petitioners was not a reorganization in that it did not involve the adoption or approval of a plan and agreement of reorganization under which the property in the hands of

the Committee should be disposed of in any manner therein provided as required by the Bondholders' Protective Agreement.

d. That the incorporation of the Trustee Corporation did not effect a readjustment of the assets and liabilities so that the Trustee Corporation could operate as a going concern without the concert of action and exclusive control of the individual petitioners herein, and did not exhaust their powers, or amount to a performance of all their duties and obligations under the agreements.

2. Whether or not, upon the incorporation of the Trustee Corporation and the conveyance of the property to it the payment of debts incurred by the petitioners, the Bondholders' Protective Agreement, was satisfied and became *functus officio* as to the Trustee Corporation bonds and securities, and did not apply to or protect the holders of the stocks or securities of the Trustee Corporation, where such a result would be contrary to the express terms of the Bondholders' Protective Agreement.

3. Whether or not the petitioners had gravely abused their discretion in undertaking to issue ten-year refunding debentures in accordance with their powers under the agreements and the option to refund contained in the mortgage.

4. Whether or not the issuance of the refunding debentures was an abuse of discretion by petitioners, and whether or not the legal effect of the issuance of the

refunding debentures was to extend the control of petitioners over the trust properties for another ten years, or merely to prevent a foreclosure sale of the trust properties pending the further efforts of the petitioners to sell the same for distribution of the proceeds; it appearing that they had made repeated attempts to sell the same consistent with their duties as trustees, no other motive or intention being ascribed to them, and their power to issue the refunding debentures being expressly conferred upon them by the original debentures and the mortgage securing them.

5. Whether or not the court may enjoin the exercise of a power given in trust, contrary to the terms of the trust agreement.

6. Whether or not under Federal practice the court can take action to destroy a trust under state law, but continue the trustees in control under the theory of *powers in trust;* such trusts not being recognized under the laws of the state in which the property is situated and in which the court sits.

7. Whether or not a Federal Court can take over and administer a trust in property in the state where the court is held, where the state courts have no such power, under their own laws and jurisprudence governing trusts.

8. Whether or not state laws and decisions determine when there has been such misconduct of trustees as will enable a Federal Court to terminate or administer the trust.

9. Where neither party has asked or contended for a judicial administration of a trust, may an appellate court authorize the same on remand without giving the parties an opportunity to be heard thereon?

10. Where trustees hold under a trust agreement designed to prevent the necessity of judicial proceedings, and the trustees proceed with the exercise of the duties imposed; may an appellate court direct and authorize judicial supervision and ultimate dissolution thereof, contrary to the terms of the agreement, and if so, under what circumstances?

    a. Should it do so because the trustees refuse to surrender control to a purchaser of the majority interests?

    b. Should it do so because majority interests request judicial intervention?

    c. Should it do so because the trust-management has been successful to the extent of increasing the value of the trust property from a mere nominal value to fifty percent, or more, of its par on original value, and placing its operating corporation in such position that it might be sold as a going concern?

11. Where abuse of discretion is not one of the grounds for the dissolution of a trust under the laws of the state where the property is located and where the court is held, but merely renders the trustees accountable; may a Federal Court disregard the state rule; and may an appellate court fix the law of the case by its judgment directing the trial court to take such steps as would be in violation of the state rule?

12. If abuse of discretion is grounds for dissolution or judicial administration of a trust, is a finding of abuse *vel non* a finding of fact, or conclusion of law—or—

    a. When is it a finding of fact?

    b. When is it a conclusion of law?

    c. When may the parties stipulate whether or not abuse of discretion will terminate a trust?

    d. When will a conveyance in absolute trust, without limitation as to discretion be enforced according to its terms?

13. Where findings of fact and conclusions of law are not separately stated in writing by the District Judge, and on appeal no action is taken to require a full and complete compliance with Rule 52 of the Rules of Civil Procedure, there being a written opinion by the District Judge incorporated in the Record—

    a. Does the appellate court proceed anew to find the facts for itself, as in admiralty cases?

    b. Is the court privileged to adopt such findings as it pleases, and reject others without regard to the opportunities of the trial court and to the rule that findings must be accepted unless clearly erroneous?

    c. Is the true rule that in such cases the appellate court finds the opinion to be a substantial compliance under the harmless error rule, and binds itself to treat as fact that which is fact, and as law that which is law?

14. Will the petitioners in this case have been afforded due process of law; the mandate authorizing the District Court to proceed on a theory not presented by the record in the court below, not contended for by the parties, and on which they have had no reason to suppose the appeal would turn, the principles established being contrary to the decisions of the state establishing rules of property well known to the attorneys in the case and concerning which there was no controversy?

15. Does not due process of law require an appellate court to submit any question which it finds to be determinative of the case, but which was not raised by the parties, to a further consideration by the litigants and a further hearing on such question before it rules thereon and makes its rule the law of the case?

16. Where a trust agreement is so drawn as to repose absolute and unlimited control in the trustees and to the exclusion of the courts, and a third party buys shares of the beneficial interests to the extent that he can control the property on a dissolution of the trust, and brings actions which harass the trustees and hinder their administration; to what extent will the process of this Honorable Court be available to discontinue a judicial interference and administration which was not contemplated by the original parties to the trust agreement, not within the terms, and which would not be permitted by ~~its~~ the courts of the state in which the trust property is located.

REASONS FOR ALLOWANCE OF WRIT

I.

The Circuit Court has decided an important question of local law in a way which is probably in conflict with applicable local decisions. It has assumed that an abuse of discretion authorizes the termination of a trust, and that on a judicial administration it could still compel and control the actions of these same trustees, to whom the trust was committed, on the theory that they were trustees of the powers after the properties had been given to the beneficiaries. This principle does not operate in Mississippi, and these trustees would be at liberty to refuse to function under the court or as judicial trustees.

The court below did not intend to confuse the capable handling of the estate at the hands of these petitioners, but did so in such a way that it will appear to practitioners of the Mississippi Bar that where a trust may not be terminated under local law, the same result may be accomplished by the difference in Federal and local procedure.

II.

The Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. It has found facts and stated its conclusions without regard to the findings and conclusions of the District Court, except to note an apparent deficiency therein (R. p. 649). It found that the express terms and provisions of the trust agreement providing for equal protection under unity of action and control, as required by the Bondholders' Protective Agreement,

under the authority of which the trust was created, and pursuant to which protective covenants were made, afforded no protection to minority certificate holders. On this conclusion, it based its decision; since it says that if the trust agreement had related to the original bondholders, or if the protective agreement had related to the securities of the Trustee Corporation, the trial court might have been justified in dismissing the complaint (R. 649—last sentence). Realizing that the trust could not be dissolved without a reorganization of the Trustee Corporation, it remanded the action to the District Court with directions that in lieu of dissolution, the court take jurisdiction of such proceeding as might be required to preserve the Trustee Corporation (presumably an arrangement as in Bankruptcy reorganization), although no such relief had been prayed, its efficacy or appropriateness had not been asserted by the parties, and such jurisdiction had not been invoked. It authorized the court to deprive the individual petitioners herein of their powers as trustees to hold and exercise unity of control and management of the entire properties; the trust properties being then in a condition in which the equal protection of minority as well as majority interests required unity of control and management.

III.

The court below has failed to apply Rule 52 of the Rules of Civil Procedure in the way that it was intended, in the way it should be applied, or in any manner to make it effective.

IV.

The limits and extent of protection of minority interests by Protective Agreements and by the Federal Courts

should be clarified by a complete exposition of the rules governing the rights of the parties in this action. This record demonstrates a successful management and control of the properties prior to the institution of action by Respondents. All interests were equally protected and any holder desiring to liquidate his holdings was provided with a negotiable certificate for that purpose. These certificates showed a continuous rise in value from 1930 to 1939. While their value since the commencement of this action is not shown by the record, the court can not be blind to its effect.

V.

An important question of Federal law of procedure is presented on this record and should be decided by this court. The Circuit Court reversed the judgment of the District Court, and ordered the granting of the injunction prayed by respondents. However, it conditioned its action upon directions it gave for further proceedings, ranging from a continuation of the trust for a period shorter than the alloted ten years, to an immediate reorganization of the Trustee Corporation. None of this relief was prayed in respondents' complaint, unless it could have been granted under the general prayer. The power and jurisdiction of the court to take such action in a case where such relief was not in issue, was not contended for by the parties, and on a record developed upon an entirely different theory, without affording the parties an opportunity to be heard on the proposed action before it is made binding as the law of the case, raises a grave constitutional question which this court should set at rest.

PRAYER

For all of the reasons hereinabove set forth, and others on the face of the record herein which may be apparent to the court, Petitioners pray the grant of the Writ of Certiorari to review the action of the Circuit Court of Appeals for the Fifth Circuit, and that on a full and final hearing, the judgment of said court shall be reversed.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This is an application for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, reversing a judgment of the District Court for the Southern District of Mississippi.

OPINION BELOW

The opinion of the Circuit Court of Appeals is included in the Record at pages 643 to 658, inclusive, and is reported in 120 F. 2d, 753. The opinion of the District Judge is not reported, but appears in the Record at pages 606 to 620, inclusive.

JURISDICTIONAL STATEMENT

A jurisdictional statement is included in the Petition filed herein, and appears at pages 7 to 9, supra. This statement is intended to show the jurisdiction of the District

Court, that all steps on appeal and for this application were timely taken, and that this court has full jurisdiction to grant the relief to which Petitioners are entitled, by certiorari.

STATEMENT OF THE CASE

A short statement of the facts appears in the Petition at pages 2 to 7, and is adopted here. The Bondholders' Protective Agreement, referred to in the Petition, appears in the Record at pages 54 to 69, inclusive. Particular attention is called to Paragraph Seven of the Protective Agreement (R. p. 61), which provides (R. p. 63) that the Committee may cause a corporation to be organized to take and hold the properties belonging to or acquired by the trust, charged in such manner as the Committee should deem appropriate. Petitioner, Hotel Markham, Inc., (herinafter referred to as the Trustee Corporation) was created by the Committee under this provision of the Protective Agreement[1]. The capital structure of the corporation was the issue of no par value stock, set up on its books at $5.00 per share at the rate of one share for each $100.00 of bonds and coupons held by the Committee; gold cumulative interest bearing debentures, interest payable as earned, to mature on November 1, 1940, in the amount of the bonds and coupons, or $598,960; the asumption of the obligations arising from a prior lien to secure $50,000 to pay cost of foreclosure and provide working capital; the acquisition of additional facilities not covered by the original mortgage, but which were necessary to the conduct of the business; and liability for all accrued taxes and cost of operation, repairs and improvements accrued and to accrue. As against this, it ac-

[1]See Resolution of the Committee as set out in the Record at Pages 89 to 91, inclusive.

quired the mortgaged properties, originally constructed at a cost in excess of $1,000,000, but not then regarded as having value in excess of $100,000[2].

Obviously, the Trustee Corporation was not a going concern, and could not be made so on a reorganization that would not destroy the value of its securities. The securities mentioned were accepted by the trustees and placed in the depository to be held for the Committee as the trustees thereof with all powers, rights and privileges vested in them by the Protective Agreement, but to be allocated, subject to such ownership and control, to certificates of participation in the trust to be issued by the depository on the surrender of the depository receipts issued when the bonds were surrendered under the Protective Agreement.

As to these facts, there seems to be no controversy. It does not appear that the Court of Appeals thought, or that Respondents contend, that the powers of the Committee would have been impaired by lapse of time, or by the action taken under the option in the debenture mortgage to refund the debentures for principal and unpaid interest, except for the execution of the Committee of a declaration of trust[3] on the 5th day of August, 1930, after the mortgaged property had been acquired by the Committee, but before its transfer to the Trustee Corporation. Particular care was taken in the preparation of the trust agreement to preserve all the rights of the bondholders under the Protective Agreement, as well as the ownership and powers of the Committee under that instrument[4]. The effect of the Declaration of Trust was to convert the trust from one resulting in law by the fact

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[2]R. 574. The 12½ per cent. price refers to the original issue of $600,000 of bonds of Gulfport Hotel Company.

[3]R. 71 to 81.

[4]Cf. R. 61 and R. 72. See particularly R. 77.

of acquisition of the properties with the assets of the beneficiaries, to a documentary express trust within the Mississippi Statute of Frauds[5]. To some extent, it was an exercise of the power of the Committee to reform the Protective Agreement under the provisions of Paragraph Twelve thereof[6], but especially it was an exposition of the duties and authority of the Committee thereunder. It was not a termination of the resulting trust in the physical properties acquired by the Committee with the assets of the bondholders, but the consummation of that trust, without the intervention of a court, and pursuant to the purposes and provisions of the agreement.

With the stock and debentures under the legal ownership of the committee with unlimited power to deal therewith for the benefit of the certificate holders, the operation by and through the Trustee Corporation was begun and continued for nine years. It is conceded that the management and conduct of the business was exceptionally good, and, if it is material, was more successful than the efforts made to rehabilitate any of the many hotels on the Mississippi Coast which failed during the depression[7].

No question was raised until Respondent Ball, having acquired a competing property, the largest hotel on the coast, but not as favorably situated for continuous operation, be-

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[5]Mississippi Code of 1930, Sec. 3348.—"Hereafter all Declarations or creations of trusts or confidence of or in any land shall be made and manifested by writing, signed by the party who declares or creates such trust, or by his last will, in writing, or else they shall be utterly void; and every writing declaring or creating a trust shall be acknowledged or proved as other writings, and shall be lodged with the clerk of the chancery court of the proper county to be recorded, and shall only take effect from the time it is so lodged for record, but where any trust shall arise or result, by implication of law, out of a conveyance of land, such trust or confidence shall be of the like force and effect the same as it would have been if this statute had not been passed."

[6]R. 68.

[7]R. 364, 374, 378, 382, 386, 252-257.

came the owner of 223 certificates of participation in December, 1938[8]. These were acquired through the First National Bank in Meridian, which had large holdings acquired through the purchase of the assets of its predecessor on liquidation, and which acquired others for Respondent. These certificates had been objected to by the Comptroller, as assets of the bank, and it was necessary to block a large quantity to affect a sale[9]. Thereupon, Respondent began to demand a voice in the Committee action, and when the time arrived for the exercise of the option to refund, adopted obstructionist tactics. Considering Mr. Ball a prospective purchaser, the Committee attempted to mollify him in every way possible[10]. Acting on the advice of their attorneys[11], the Committee refused to accord to Ball the voice and control he demanded, and thereupon he instituted this action.

On the trial, the District Court held that the terms of the Protective Agreement, as well as of the Declaration of Trust, controlled the actions, functions and duties of the Committee[12], and that the trust was terminable only on the agreement of all the beneficiaries, the liquidation of the trust by the trustees, or their determination that the trust should be terminated and the property, whether stocks, bonds or other assets, should be delivered to the certificate holders. Thereupon the court dismissed the complaint[13].

On appeal, the majority of the Circuit Court of Appeals held that the Protective Agreement did not apply to the securities issued by the Trustee Corporation, but applied only to the original bonds[14], and that the trust terminated as soon

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[8]R. 29.
[9]R. 547, 549, 436.
[10]R. 263, 264-287, 434, 577-584.
[11]R. 249, 423-430.
[12]R. 608-612.
[13]R. 621.
[14]R. 649.

as the Trustee Corporation had paid the obligations assumed by the Committee[15]. It held that the Committee had abused its discretion in electing to refund under the terms of the existing mortgage[16]. However, being unwilling to destroy the trust under these drastic holdings, it directed the District Court to control the delivery of the trust property as to time and conditions, thus empowering the court to require a continued holding by the trustees after their legal title had been extinguished. It further directed that the court determine whether some other appropriate relief should be granted to Respondents. No suggestion of what this other appropriate relief might be appears in the opinion. If it is to be a reorganization, as in Bankruptcy; or a receivership, as in the alternative prayer of the complaint; the court is not to have the guidance of the Protective Agreement, because that has become *functus officio* under the majority holding; or of the Committee, which has been successful in its operations, since their obligations arose from a legal title which has been extinguished[17].

SUMMARY OF ARGUMENT

I.

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY WHICH IS PROBABLY IN CONFLICT WITH LOCAL DECISIONS.

State, ex rel. Knox, Atty. Gen., v. Edward Hines Lbr. Co., 150 Miss. 1, 115 So. 598;

Hiscrodt v. Hamlett, 74 Miss. 37, 20 So. 143.

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[15]Note that under this theory, the debentures and stock should have been distributed in 1931, after the corporation had obtained funds under a prior mortgage and paid the obligations in question.

[16]R. 650.

[17]In this connection it should be noted that during their service, the committee members were not permitted to receive any compensation. R. 66—(Protective Agreement, Par. Tenth).

II.

THE CIRCUIT COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS IN SUCH MANNER AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Constitution of Mississippi, Secs. 156, 157 and 159; (See Miss. Code 1930);

Nelson v. Ratliff, 72 Miss. 656, 18 So. 487;

Ray v. Kelly, 82 Miss. 597, 35 So. 165;

Anderson v. Love, 169 Miss. 219, 153 So. 369;

Amis v. Smith, 16 Pet. 303, 10 L. Ed. 973;

Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458, 45 Sp. Ct. 543, 69 L. Ed. 1050;

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 Sp. Ct. 817, 82 L. Ed. 1188;

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 Sp. Ct. 860, 82 L. Ed. 1290.

III.

THE CIRCUIT COURT OF APPEALS HAS FAILED TO FOLLOW A RULE OR PROCEDURE PROMULGATED BY THIS COURT, AND ITS ACTION DEMONSTRATES THE NECESSITY FOR AN EXPOSITION BY THIS COURT OF THE SCOPE AND EFFECT OF THE RULE.

Stoltz v. United States, (9 Cir.) 99 F. 2d, 285;

Bonding and Insurance Co. v. Preferred Insurance Co., (6 Cir.) 110 F. 2d, 764;

Drybrough v. Ware, (6 Cir.) 111 F. 2d, 548.

IV.

THE RIGHTS OF MINORITY INTERESTS AND TRUSTEES UNDER BONDHOLDERS' PROTECTIVE AGREEMENTS CREATING COMMON LAW TRUSTS IN STATES WHERE SUCH TRUSTS ARE VALID UNDER THE ENGLISH DOCTRINE OF USES UNDER THE STATUTE OF 27, HENRY VIII, SHOULD BE EXAMINED BY THIS COURT AND RELATED TO THE PRACTICE AND PROCEDURE IN FEDERAL COURTS.

Brown v. West's Heirs, 7 How. (8 Miss.) 181;

Murdock v. Hughes, 7 Smedes and M. (15 Miss.) 219;

Nelson v. Ratliff, 72 Miss, 656, 18 So. 487;

Hiserodt v. Hamlett, 74 Miss. 37, 20 So. 143;

Enochs & Flowers, Ltd. v. Roell, 170 Miss. 44, 154 So. 299;

Brown v. Sperry, 182 Miss. 488, 181 So. 734;

Tanous v. White, 186 Miss. 556, 191 So. 278;

Thompson v. Schmitt, 115 Tex. 53, 274 S. W. 554;

Howe v. Keystone Pipe and Supply Co., 115 Tex. 158, 274, S. W. 563;

Mississippi Code of 1930—Sec. 3848;

Pomeroy's Equity Jurisprudence (Fourth Ed.) Secs. 1003-5.

V.

THE CIRCUIT COURT OF APPEALS HAS DECIDED THIS ACTION ON A THEORY NOT PRESENTED BY THE RECORD BEFORE IT, WITHOUT GIVING THE PARTIES AN OPPORTUNITY TO BE HEARD THEREON, THUS DEPRIVING PETITIONERS OF THEIR DAY IN COURT.

Lutcher & M. Lbr. Co. v. Knight, 271 U. S. 257, 30 Sp. Ct. 505, 54 L. Ed. 757;

Sanders v. Shaw, 244 U. S., 317, 37 Sp. Ct. 638, 61 L. Ed. 1163;

Willing v. Binenstock, 302 U. S. 272, 58 Sp. Ct., 175, 82 L. Ed. 248;

Collins v. Yosemite Park Co., 304 U. S. 518, 58 Sp. Ct. 1009, 82 L. Ed. 1502.

ARGUMENT

The court will have seen that this is a contest between petitioners, serving without compensation, struggling to hold unity of ownership, control and management for the equal benefit of all concerned, as against the purchaser of a majority interest in the estate, who frankly states that he wishes to exercise a control that will be to his individual advantage[18]. Thus, no apology will be offered, nor excuse given for the alleged disfranchisement of Respondent and his large equitable interest in the stock and debentures.

I.

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY WHICH IS PROBABLY IN CONFLICT WITH LOCAL DECISIONS.

The Circuit Court of Appeals has held that the Bondholders' Protective Agreement was rendered *functus officio* by the Declaration of Trusts and the acquisition by the Committee of the debentures and stock of the Trustee Corpora-

[18]R. 569, 582, 548, 40(d); A chain management with the Hotel Markham as one of the base properties of a holding company pyramid, may or may not be to the advantage of the certificate holders, but the election to allow the certificates to be transposed into stock in one of the operating companies must be made by petitioners, under the terms of the trust.

tion. The majority, speaking through a Judge from the State of Texas where Common Law Trusts are inoperative[19], with the concurrence of a Judge from the State of Louisiana, which models its laws upon the Code of Napoleon, have overruled the holding of a Judge from Alabama, whose laws are similar to those of Mississippi[20], and the trial Judge in Mississippi[21].

The validity, powers, existence, and characteristics of business trusts under the laws of the State of Mississippi are discussed at some length in the case of *State ex rel Knox, Atty. Gen., v. Edward Hines Lumber Co.*, 150 Miss. 1, 115 So. 598[22]. It does not seem appropriate to argue to this court that the consummation of a resulting trust arising out of a contractual relationship created by a protective agreement and the deposit of bonds thereunder, by the declaration of the express trust by the holders of the legal title to the property, that they would carry out the terms of and perform the duties imposed by the original covenant, including unity of control and management, could render the original charter *functus officio*, destroy the utility of the trust, and render the signers of the declaration of trust, trustees only because of their own wrong in continuing to hold and act as such.

The action of the Circuit Court of Appeals should be reviewed by this court.

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[19] *O'Dell v. Grubstake Investment Association* (Tex. Civ. App.) 38 S.W. 2d, 151, 152.

[20] Cf. *Alabama Code of* 1923, Sec. 6917, and *Mississippi Code of* 1930, Sec. 3348.

[21] Note also that the trial Judge may sit with the Circuit Court by designation. The situation is similar to that in John Hancock Mut. L. Ins. Co. v. Bartels, 308 U. S., 180, in which this court granted the writ because of the differing views of the judges within the circuit.

[22] See 150 Miss. 51, 115 So. 606, quotation from *Hiserodt v. Hamlett*, 74 Miss. 37, 20 So. 143: "One may do what he will within legal limits, with his own. He may declare a trust absolute, never thereafter having, in anywise, the right to interfere with it, or he may declare a trust revocable upon a named contingency."

II.

THE CIRCUIT COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDING IN SUCH MANNER AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In its majority opinion, the court says:

> "But a reading of the protective agreement discloses no word or line in it with regard to protecting minority from majority holders . . ."

It then proceeds to consider the protective agreement as separate and distinct from the declaration of trust.

This treatment ignores the complete distinction preserved in Mississippi between courts of law and courts of equity[23]. The regulation and enforcement of trusts is one of the original inherent powers of a court of equity[24], and Mississippi courts of equity recognize the rule that equity regards substance rather than form[25].

Ignoring the purpose and effect of the agreement and declaration, the Circuit Court of Appeals authorized the District Court to order the delivery of the trust property to the certificate holders. In so doing, it held that the legal title and right to immediate possession had merged with the equitable title. If this had been true, the trust had ended[26]. But how had it terminated? Not by limitation, for there was none, and this being a business trust, it required no limi-

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[23]Cf. *Constitution of Mississippi*, Secs. 156, 157, and 159; *Smith v. Everett*, 50 Miss. 575.
[24]*Clews v. Jamieson*, 182 U. S. 461, 21 Sp. Ct. 845, 45 L. Ed. 1183.
[25]*Dogan v. Cooley*, 184 Miss. 106, 185 So. 783, 787.
[26]*Healey v. Alston*, 25 Miss. 190.

tation. Not by the election of the trustees, for they are here petitioning for its preservation. Not by a reorganization, because later in the majority opinion, the Appellate Court attempts to authorize the trial court to reorganize, or take further measures, none of which it could do if a reorganization had been perfected. If the merger had occurred, by an executed plan of reorganization, or by other means, the court could not have kept the trust alive as such, but would have been bound to order immediate surrender of the stocks and debentures.

Under Mississippi Law, a trust will be preserved according to the strict letter of the instrument creating it[27]. This is a settled rule of property in Mississippi[28]. Therefore, it was binding upon the Circuit Court of Appeals[29]. It was the duty of the Circuit Court of Appeals to apply the rule as established in Mississippi[30], including such principles as are applicable in the local courts of equity[31]. This court should exercise its power of supervision.

III.

THE CIRCUIT COURT OF APPEALS HAS FAILED TO FOLLOW A RULE OF PROCEDURE PROMULGATED BY THIS COURT, AND ITS ACTION DEMONSTRATES THE NECESSITY FOR AN EXPOSITION BY THIS COURT OF THE SCOPE AND EFFECT OF THE RULE.

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[27] *Ray v. Kelly*, 82 Miss. 597, 35 So. 165.

[28] See *Anderson v. Love*, 169 Miss. 219, 153 So. 369, quoting *Bogert on Trusts* (7th Ed.), Sec. 104, and citing *Nelson v. Ratliff*, 72 Miss. 656, 18 So. 487.

[29] *Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973; *Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458, 45 Sp. Ct. 543, 69 L. Ed. 1050.

[30] *Erie R. C. v. Tompkins*, 304 U. S. 64, 58 Sp. Ct. 817, 82 L. Ed. 1188

[31] *Ruhlin v. New York L. Ins. Co.*, 304 U. S. 202; 58 Sp. Ct. 860, 82 L. Ed. 1290.

The District Court did not find the facts specially and state separately its conclusions of law thereon as required by Rule 52 of the Rules of Civil Procedure. However, it filed a comprehensive opinion and directed the entry of the appropriate judgment. The rule provides that "Findings of fact shall not be set aside unless clearly erroneous." In such a case, we may invisage three possible courses which might have been open to the appellate court. It might have remanded the cause for more definite and specific findings; or treated the record as before it for trial de novo as in admiralty cases; or it might have treated the opinion as a sufficient finding of fact and separate statement of conclusions of law, and proceeded to apply the remainder of paragraph (a) of the rule, binding itself to treat as fact that which was found as fact, unless clearly erroneous. The Sixth Circuit Court of Appeals has held[32] that failure to request or object under Rule 46 precludes the party from raising the point on appeal, but this would create a repugnancy between Rule 46 and that portion of Rule 52 which provides "Requests for findings are not necessary for purposes of review." Moreover, it seems gratuitous when the possibility of a request under Rule 46, being denied is considered in connection with the problem of the reviewing court. On a request being denied, would the reviewing court be required to remand the action for more specific findings if it found the opinion sufficient for purposes of review? Obviously, the appellate court could treat the delinquency as harmless error under Judicial Code Sec. 269 (28 U. S. C. A. 391)[33]. But if it be

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[32] *Bonding and Insurance Co. v. Preferred Insurance Co.*, 110 F. 2d, 764.
Drybrough v. Ware, 111 F. 2d, 548. With deference it is suggested that the rule imposes a duty upon the courts without regard to the conduct of the parties.

[33] *Stoltz v. United States*, (9 Cir.) 99 F. 2d. 285.

found to be harmless error, it necessarily follows that the facts are sufficiently stated, and the findings may not be set aside unless clearly erroneous.

A reading of the majority opinion discloses that the court treated the whole matter as one for its decision *de novo.* It proceeded to a consideration of the record without reference to the findings of the trial court, except to comment on their insufficiency as to the purposes of the protective agreement and abuse of discretion by the trustees[34]. The court then proceeded to reverse the District Court, without consideration of whether it had found facts or stated conclusions. It says, "We think he was wrong in both particulars", but it does not say that the trial court was clearly erroneous. It does not mention the array of testimony to the contrary, which the District Court excluded because it found no confict between the documents under consideration, and that their provisions controlled as to bonds as well as stock and debentures[35]. No authorities are cited, and no statement or rule of law is mentioned. The Circuit Court of Appeals finds that the Committee has abused its discretion by attempting to project its control over a period greater than ten years. The whole matter is discussed as if it were within the sole discretion of the Court of Appeals and as if conclusions and results were mere matters of fact.

Where this ten-year prototype of the rule against perpetuties originated is known only to the court. Like its great predecessor, it seems to be a logical monstrosity, since indefinite factors can never yield a definite result[36]. In order

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[34]R. 649.

[35]R. 610-11, 616, 618. Cf. R. 649,—last sentence, continued on page 650.

[36]The rule against perpetuities does have the saving grace of preserving indefiniteness to the extent of the life in being, but under this case, the rule is either ten years or between ten and twenty years, the latter view producing two definite quantities instead of one.

to clothe this finding with a semblance of logical decency, it must be classed as a rule of law that ten years is the limit of time during which settlers may project a business trust[37]. But aside from the conflict with local decisions, the rule is invoked to prevent the exercise of a power and option which the court does not and can not say was improperly reserved.

It is believed that an exposition of Rule 52 will be of great assistance, both to bench and bar.

IV.

THE RIGHTS OF MINORITY INTERESTS AND TRUSTEES UNDER BONDHOLDERS' PROTECTIVE AGREEMENTS CREATING COMMON LAW TRUSTS IN STATES WHERE SUCH TRUSTS ARE VALID UNDER THE ENGLISH DOCTRINE OF USES UNDER THE STATUTE OF 27, HENRY VIII, SHOULD BE EXAMINED BY THIS COURT, AND RELATED TO PRACTICE AND PROCEDURE IN THE FEDERAL COURTS.

A noted author[38] tells us that the legislation of several states[39] had important effects on the growth and development of trusts, where adopted to regulate and prohibit their use. From some of these jurisdictions come announcements which are strange to states where the English rule prevails. Under the same words of conveyance in a trust instrument, the trustee may hold all title, both legal and equitable, with only a thing in action vested in the cestui qui trust; or all title may pass to the beneficiary, by operation of statute as under the original Statute of Uses, but the powers remain in the trustee until exhausted.

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[37]Cf. *Nelson v. Ratliff*, 72 Miss. 656, 18 So. 487; *Hiserodt v. Hamlett*, 74 Miss. 37, 20 So. 143.

[38]*Pomeroy's Equity Jurisprudence* (Fourth Edition) Secs. 1003-5.

[39]New York, Michigan, Wisconsin, Minnesota, California, and North Dakota.

This separation of powers from estates or interests in the trust property was the outgrowth of special statutes under the seasoning influence of the necessities of the business community. The same political and economic influences which brought about the development of business trusts have brought surprisingly similar results throughout the land[40]. This division of trust powers from title for judicial purposes would appear to be advantageous where law and equity are fully merged, and for practical purposes distinctions are a mere matter of terminology. But in states where the existence of the trust depends upon the separation of the legal and equitable estates[41], the Federal courts must not disregard fundamental distinctions if the rights of the parties under local law are to be preserved.

In the instant case the protective agreement was sufficient in all respects to create a trust in the bonds of the Gulfport Hotel Company, and to authorize all subsequent acts of the trustees. However, it was not sufficient to create an express trust in the real estate upon which the bond mortgage was given, since it was created by the bondholders on their depositing their bonds, and since they had not signed the writing creating the trust as required by statute[42]. But the depositing bondholders were contractually obligated to each other to create a trust and had designated the trustees as their agents to perfect it. The contract had been performed only to the extent that the trustees held the legal title under a resulting trust[43], and it became necessary for the trustees

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[40]Texas seems to be alone in having invalidated any form of business trust and transposing it into a partnership without statutes directly relating to the subject. *Howe v. Keystone Pipe and Supply Co.*, 115 Tex. 158, 274 S. W. 563; *Thompson v. Schmitt*, 115 Tex. 53, 274 S. W. 554.

[41]Cf. *Enochs & Flowers, Limited, v. Roell*, 170 Miss. 44, 154 So. 299.

[42]*Mississippi Code* 1930, Sec. 3348, *supra* note 5.

[43]*Brown v. West's Heirs*, 7 How. (8 Miss.) 181; *Murdock v. Hughes*, 7 Smedes and M. (15 Miss.) 219. *Tanous v. White*, 186 Miss. 556, 191 So. 278.

to execute a declaration of trust in the performance of their obligations under the protective agreement. Holding the legal title, they were empowered to declare the trust by the terms of the agreement. Thereafter, in the performance of these same obligations, the trustee corporation was formed and the property was transferred to it. This conveyance of the legal title to the land terminated the declared trust as to it, but did not destroy the trust created by the protective agreement. It substituted the debentures and stock, which were personal property, for the land in which it declared a trust. The trust created in the protective agreement, having been preserved through the medium of the declaration of trust, continued to be operative and would control, as against the declaration. Thus we have the example of a division of legal and equitable title, with two changes in the nature as well as the corpus of the legal estate, but no change in the nature of the equitable estate.

The only apparent explanation for the action of the court in this case is that the majority thought that the conveyance of the trust property to the Trustee Corporation, for the debentures and stock, was a surrender of the legal title to the trust properties with the retention by the trustees of the powers they had acquired through the acquisition of the securities[44]. If this be the true reason, the court has confused ordinary trusts with powers in trust resulting from conveyances under special statutes. The powers existed, if at all, because of the legal ownership of the stocks and debentures, and this could not be questioned under the trust documents. The equitable rights of the original bondholders or their assigns, now certificate holders, had undergone no qualitative change whatever[45]. Since the qualitative na-

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[44]Cf. R. 649-50.
[45]*Brown v. Sperry*, 182 Miss. 488, 181 So. 734.

ture of the rights, powers and duties of trustees and cestui qui trust are and must be in equilibrium, the powers and duties of the trustees remain the same throughout the various transfers.

V.

THE CIRCUIT COURT OF APPEALS HAS DECIDED THIS ACTION ON A THEORY NOT PRESENTED BY RECORD BEFORE IT, WITHOUT GIVING THE PARTIES AN OPPORTUNITY TO BE HEARD THEREON, THUS DEPRIVING PETITIONERS OF THEIR DAY IN COURT.

It has been noted that the Circuit Court of Appeals did not propose to destroy the trust involved in this action without further proceedings. These further proceedings involved considerations ranging from a delay in granting the relief prayed, during which it is presumed the matter would remain in the same status; to some other appropriate relief, presumably a reorganization of the Trustee Corporation. At one extreme, we have these petitioners compelled to act as trustees of a bare legal power, which is not what they contracted to do; and required to serve under direction of the court, which all wished to avoid; and to do so without compensation, which the court could not compel. At the other extreme, a reorganization would be effected in which petitioners would be denied the exercise of their powers, but compelled to act on behalf of the minority group without the safeguards of the agreements that all interested had entered into.

Neither of these extremes, nor any result which might lie between them are within the prayer of the complaint filed[46]. The issues as made up were whether or not Respond-

[46]R. 51.

ent should have the debentures and stock, or the appointment of a receiver; or whether or not his complaint would be dismissed. However, the opinion of the court fixes the law of the case, and on remand, petitioners are confronted with contingencies not within their reasonable contemplation prior to the decision in question. Therefore, they have been denied their day in court, and this court should grant the writ[47].

CONCLUSION

For all of the reasons mentioned, and for reasons which will appear to the court, it is submitted that the Petition for Writ of Certiorari should be granted in order that this court may examine and reverse the judgment of the Circuit Court of Appeals in this action.

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[47] *Lutcher & M. Lbr. Co. v. Knight*, 217 U. S. 257, 267, 30 Sp. Ct. 505, 54 L. Ed. 757; *Sanders v. Shaw*, 244 U. S. 317, 37 Sp. Ct. 638, 61 L. Ed. 1163; *Willing v. Binenstock*, 302 U. S. 272, 58 Sp. Ct. 175, 82 L. Ed. 248; *Collins v. Yosemite Park Co.*, 304 U. S. 518, 58 Sp. Ct. 1009, 82 L. Ed. 1502.

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CHARLES ELMORE CROPLEY
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 653

HOTEL MARKHAM, INC., ET AL.,
Petitioners,

versus

EDWARD BALL, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The Petition, particularly the "Statement" (pp. 2-7) omits so many important facts and contains so many incorrect conclusions, that a brief restatement is necessary in order to give this Court a clear picture of what occurred in this case in the lower courts. In fact, it is difficult to understand how Petitioners could have so confused the facts and issues presented to and decided by the Circuit Court of Appeals.

RESTATEMENT OF CASE.

This is a suit by Ball et al., cestui and holders of Certificates of Deposit, against Defendant Trustees, members of a Bondholders Committee. The Committee was self-constituted, (R. pp. 73-4) and prepared the so-called Protective Agreement. They solicited the deposit with them, under the agreement, of bonds of Gulfport Hotel Company. The bonds deposited with them were used by them in the purchase of the hotel property at a foreclosure sale under the mortgage which secured the bonds. (R. p. 89) Having acquired title to the property, they then, in accordance with the laws of Mississippi, executed and recorded a formal Declaration of Trust (R. pp. 78-9) by the terms of which they obligated themselves as Trustees to hold the property *in trust for the pro rata benefit of the depositing bondholders of Gulfport Hotel Company* and to distribute the income and proceeds in "*monies, stocks, bonds, securities and other properties received by them from a sale and conveyance of such properties and/or pursuant to any plan of reorganization effected by such committee, after all obligations of such committee and all lawful claims against such property, if any, have been fully paid*".

The Committee did not sell the property. Instead it elected to and did effect a reorganization by adding new members (whom they selected) and by obtaining a corporate charter for Hotel Markham, Inc., to which they conveyed title to the property (R. pp. 89-95). As consideration for that conveyance of the trust property, the Corporation (the Committee, being its officers, directors and stockholders) issued to the Committee all of the stock of

the corporation and all Debentures of the corporation totalling approximately $600,000. (R. p. 247 and p. 454). The Committee deposited the stock and debentures with a bank, which issued to each depositor of Gulfport Hotel bonds a Certificate of Deposit which included an express provision that the Committee was holding for the account of the owners a certain number of shares of stock in Hotel Markham, Inc., and certain specifically designated and numbered debentures. The Trustees (Committee) have retained possession of the stock and debentures of Hotel Markham, Inc., and control and the management of the Hotel property for ten years; they have paid all obligations created by the Committee. (R. p. 383) The corporation still holds title to the property and has been operating at a profit.

The so-called Protective Agreement is to be construed against the Committee, which proposed it. The Committee was organized for the benefit of holders of *bonds of the old Gulfport Hotel Company.* It was not a voting trust, and made no provision for control of the voting power of stock in Hotel Markham. It does not purport to be a Trust of the securities of Hotel Markham, Inc. These securities were received and held by the Committee solely as a result of the transfer of title to the corporation and are held under the terms of the *original Declaration of Trust.* The Committee was not *required* to organize a new corporation. It did so on its own responsibility. *Having paid the obligations which as trustees they incurred and having reorganized the property by transferring title to Hotel Markham, Inc., the new corporation, in exchange for all of its stock and debentures,* it became the duty of the

Committee under the Declaration of Trust to distribute the securities so received and held by them when their obligations had been paid.

But when that time arrived, the Committee conceived the idea that they should assume the duty of protecting, (R. p. 489) *as they say*, a minority of certificate holders (which included members of the Committee) against a majority held by Plaintiffs Ball et al., by retaining control of the property through their control of the securities of Hotel Markham, Inc., though there was not a single word in either the Protective Agreement, or the Declaration of Trust authorizing them so to do. Using this self-imposed duty as an excuse, (R. p. 489) the Committee in 1939 authorized an issue of Refunding Debentures of over $800,000. (R. pp. 477-481) (twice the value of the property) maturing in 1949, to be issued in exchange for the original Debentures that were issued at the time title was conveyed to the corporation and which matured in 1940. The purpose of this issue was to perpetuate their control of the corporation and its property for another ten years. This suit was brought to restrain the issue of these Refunding Debentures, to terminate the Trust and to require delivery to Plaintiffs of the stock and debentures held by Defendants for their account. (R. pp. 51-2)

The Circuit Court of Appeals held that "the Committee was without power to extend its authority and continue its control indefinitely over plaintiffs' debentures and stocks"; "that the committee gravely abused its discretion in undertaking to issue" these refunding debentures "and thus

perpetuate their control for an additional ten-year term," and that the District Court erred in refusing to restrain the issue of them.

Since the Complaint prayed for an injunction against the issue of Refunding Debentures, which was denied by the District Court, and the Circuit Court of Appeals holds that an injunction should have been granted, that decision does not constitute a case for review by this Court. Writs of Certiorari are not issued by this Court to review evidence or to decide issues of fact. *U. S. v. Johnston*, 268 U. S. 220, 69 L. ed. 925; *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 62 L. ed. 385. Neither the Petition nor the Brief directly challenge the decision of the Circuit Court of Appeals, holding the Refunding Debentures void.

The Circuit Court of Appeals also held that "it was erroneous to dismiss their (Plaintiff's) bill without giving fuller consideration to whether under all the facts Plaintiffs should not have had the relief of delivery of their stock and surrender by Defendants of their control at a time under conditions to be fixed and determined by the court, or whether some other appropriate relief should not have been granted them".

Since these void Refunding Debentures were issued and interest paid on them after injunction was denied by the District Judge, it is now necessary to adjust the equities and determine just how and what relief can be decreed. The Appellate Court could not enter a final decree. It could only indicate by its opinion that the Trust should be terminated since the purpose of the Trust had been accomplished.

The Circuit Court of Appeals did not as the petition says (p. 6) direct the District Court to give "further consideration to any other plan that might be presented for saving the Trustee Corporation". Hotel Markham, Inc., is not a *"Trustee Corporation"*. Its stock is held by the Trustees. It has been operating at a profit. It belongs to the beneficial owners of the securities now held and controlled by the Committee as Trustees.

The statement on page 7 of the Petition that the Circuit Court of Appeals directed the District Court "to take over the trust for judicial administration and control" is not supported by any statement in the opinion of that Court. Other statements on page 7 are equally as inaccurate, and show that Petitioners have completely misunderstood the apparently simple terms of the opinion and order of the Circuit Court of Appeals.

The statement of Petitioners (pp. 2-3) that they "seek review by this Honorable Court by petition for certiorari, and a reversal of the judgment entered against them and the reinstatement of the judgment of the District Court", indicates that they regard their Petition as an appeal to review what they say is an erroneous decision and, so far as we can discover, the only real reason they have for filing the Petition is their desire to obtain another hearing. This is borne out by what are termed "Questions Presented" (Petition, pp. 9-14). Here are sixteen general questions, some of them having four sub-questions, which apparently are treated as assignments of error. All would require a review of the facts. Petitioners have not even attempted to show that the case presents a question of

sufficient importance to justify this Court in assuming jurisdiction. The case therefore involves only matters of private interest.

Petitioners were, however, aware of the necessity for making at least a superficial compliance with Rule 38, of this court, paragraph 5, and on pages 15-17 have included what they call "Reasons for allowance of writ". Though Reasons I, II, and V contain statements using generally the phraseology taken from Rule 38, these assertions are not supported. All of the "Reasons" (Petition, pp. 15-17) and the "Argument" on all of them (Petition, pp. 27-36) evidence a complete misunderstanding of what the lower court decided. This will appear from a brief analysis of these so-called "Reasons".

I.

The Circuit Court of Appeals has decided an important question of local law in a way which is probably in conflict with local decisions.

Under this heading (Petition, p. 15) we find a general assertion that the Circuit Court of Appeals has decided a question of local law contrary to applicable decisions by the Courts of Mississippi. But neither here nor in the argument under this heading (Petition, p. 27-28) is a Mississippi case cited as holding to the contrary; nor is there even an attempt to show where there is a conflict. *Edward Hines Yellow Pine Trustees v. Martin* 268 U. S. 458, 69 L. ed. 1051 (which is referred to) does contain a general discussion of the law of trusts, but neither in the facts nor

in the law does that decision conflict with the decision of the Circuit Court of Appeals in this case. The same is true of *Hiserodt v. Hamlett*, 74 Miss. 37, 20 So. 143 cited in the brief, (Petition, p. 24).

The Petition (p. 15) asserts that the Circuit Court "has assumed that an abuse of discretion authorizes the termination of a trust." We are unable to find any basis for this statement in the opinion of the Circuit Court of Appeals.

The Petition (p. 15) says "that on a judicial administration it (the Court) could still compel and control the actions of these same Trustees *** on the theory that they were trustees of the powers after the properties had been given to the beneficiaries". Courts of equity have always had the power to compel Trustees to perform their duties, to prevent abuse of their discretion and power (Restatement of the Law of Trusts Chap. VII, sec. 187), but the Circuit Court of Appeals makes no reference to such a "theory" as stated by Petitioners. Petitioners seem to have the impression that the decision involves a question of Federal procedure. But the decision rests entirely upon substantive law. It decides only two things:

1. that the District Court erred in refusing to enjoin the issue of Refunding Debentures since the issue of them was a grave abuse of discretion by Defendant Trustees.

2. that the District Court should not dismiss the bill without fuller consideration of whether Plaintiffs should not have had the relief of delivery of the securities

and a surrender by Defendants of their control, or some other form of appropriate relief.

Neither the so-called "Reason I" nor the argument (Petition, p. 28) under this heading indicates where there is any conflict with Mississippi law.

On the other hand, *Brandon v. Brandon*, 36 Miss. 222, *Prevatt v. Lord*, 36 Miss. 395, *Wade v. American Society*, 15 Miss. 663, and *Woodruff v. State*, 77 Miss. 68, 25 So. 483 in substance sustain the power of courts of equity over the administration of trusts.

II.

The Circuit Court of Appeals has departed from the accepted and usual course of proceedings in such manner as to call for an exercise of this Court's power of supervision.

"Reason" II charges the Circuit Court with a far departure from the usual course of judicial proceedings, but does not show where there was such departure. This so-called "Reason" seems to be based on the idea that the decision of the Circuit Court of Appeals rests on facts to which the District Judge failed to give due consideration. The Circuit Court of Appeals did predicate its decision in large measure on the express terms of the Declaration of Trust. The District Court gave that document little or no consideration. The Circuit Court of Appeals did hold that the Protective Agreement did not impose upon the Committee the duty of protecting a minority of holders

of Certificates of Deposit in Hotel Markham securities against the wishes of the holders of a majority, a fact which the District Court overlooked or ignored. But the Circuit Court of Appeals did not hold that the Agreement afforded "*no protection* to certificate holders"; it held that the Committee was not charged with responsibility for taking sides in this controversy between beneficial owners of the securities of Hotel Markham, Inc.

The statement in the Petition (Petition p. 16) that the Court remanded this case to the District Court with directions to "reorganize" what Petitioners choose to call the "Trustee Corporation" is gratuitious. The Court's opinion speaks for itself. That opinion includes express directions to the lower court, clearly states the grounds of decision and shows the purpose of the Court. The decree is not only not a departure from, but follows the usual course of procedure. The Trustees, having abused their power by issuing Refunding Debentures after the injunction to prevent their issue was denied by the District Court, those Debentures are void, and an appropriate form of relief to be granted Plaintiffs now, can be determined only after further consideration of the facts and circumstances in the light of the law of the decision of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals is, in effect, that the Trust should be terminated, either by delivery of the original securities to the Plaintiffs, or, if this is now impossible, in some manner that would be equitable. Since the Refunding Debentures are void, the District Court must cancel them. The time, manner and conditions of cancelling them and of terminating the Trust are to be

fixed by the trial court. This is the "usual course of proceedings" in any case in equity.

See *Restatement of the Law of Trusts*, Sec. 347 (n); vol. 65 C. J. section 128, p. 353, also *Coulter v. Robertson*, 24 Miss. 278, 57 Am. Dec. 168.

III.

The Circuit Court of Appeals has failed to follow a rule of procedure promulgated by this Court, and its action demonstrates the necessity for an exposition by this Court of the scope and effect of the rule.

Reason III does not come within the provisions of Rule 38 of this Court, and Rule 52 of the Federal Rules of Civil Procedure which is referred to, applies only to District Courts. Rule 1, F.R.C.P.

The Petition does not enlighten us as to "the way the Rule was intended to be applied or the manner in which it should be made effective", nor in what respect, if any, the action of the District Judge was "inconsistent with substantial justice". Rule 61 of the Federal Rules of Civil Procedure is directly applicable.

Petitioners made no objection to the oral statement of the District Judge. They did not even refer to it in the Circuit Court of Appeals.

From a reading of page 31 of the Petition, we must assume that what Petitioners really mean by this "Reason" is that the Circuit Court of Appeals should not have re-

viewed the findings of fact or conclusions of law of the District Judge. No further discussion of such "Reason" is necessary.

IV.

The rights of minority interests and trustees under bondholders' protective agreements creating common law trusts in states where such trusts are valid under the English doctrine of uses under the Statute of 27, Henry VIII, should be examined by this Court, and related to practice and procedure in the Federal Courts.

"Reason" IV also discloses Petitioners misconception of the functions of a Petition for a Writ of Certiorari. This Court does not grant a writ merely for the purpose of expounding a theory of law for the general benefit of bench and bar, but only for the decision of a litigated cause. There is no "relation between the substantive law of trusts and Federal practice and procedure" which requires clarification, for the substantive law of trusts in Federal Courts is *the substantive law of the state* and cannot conflict with the Federal law of procedure.

Since bondholders' protective agreements are entirely matters of voluntary contract, parties are free to incorporate any provision that is legal. There is no general law of them distinct from the general law of contracts and trusts.

The very wording of the "Reason" excludes serious consideration of it as a "reason" for the issuance of a Writ of Certiorari.

V.

The Circuit Court of Appeals has decided this action on a theory not presented by record before it, without giving the parties an opportunity to be heard thereon, thus depriving petitioners of their day in court.

"Reason" V relates solely to procedure. True, it alleges that the order remanding the case to the District Court permits of relief that was not prayed for in the Complaint, but this is not even an error, much less a violation of the Federal Constitution. The Complaint prayed for an injunction. The District Court denied that relief. The Circuit Court of Appeals holds that the District Court erred and should have enjoined issuance of the Refunding Debentures. Meantime, the void Debentures have been issued and a different *form* of relief must be granted.

The Complaint also prayed for delivery of the securities held by Defendants and in the alternative for general relief. Under the new rules of Federal Procedure, the Court is authorized to grant any form of relief to which Plaintiffs are entitled. If the form of relief to be granted at this time differs from that which should have been granted at the trial, it is due to the erroneous decree of the trial court and to the action of the Defendants, who, after the injunction was denied, gravely abused their discretion, changed the positions of the parties, and must be dealt with accordingly.

CONCLUSION

The Petition presents no Constitutional or Federal questions; no questions of state law are involved; the procedure is regular and there is no reason which would justify a review of the decision of the Circuit Court of Appeals by this Court.

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